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In The

Supreme Court of the United States

October Term, 1993

AUTO CLUB INSURANCE ASSOCIATION,
Petitioner,

v.

PENTWATER WIRE PRODUCTS, INC.,
and
FREDERICK & HERRUD, INC.,
Respondents.

On Petition for a Writ of Certiorari
to the Michigan Supreme Court

PETITIONER'S MEMORANDUM IN REPLY TO BRIEF IN RESPONSE TO PETITION ON BEHALF OF PENTWATER WIRE PRODUCTS, INC.

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In the interest of coherence, the following discussion of Respondent Pentwater's four major contentions will be presented under headings stating the conclusory substance of Petitioner's reply to them.

A. Petitioner Does Not Seek A New Remedy, But Rather A Federal Rule Of Decision Applicable To Actions Seeking The Existing Remedy Set Forth In § 502(a)(1)(B) Of The ERISA.

The gist of Respondent Pentwater's argument seems to be that Petitioner is not truly proceeding as a subrogee of Ms. Guetzka because it is seeking rights greater

than hers; that, in effect, Petitioner is seeking to create a new remedy or a new cause of action. Respondent's argument is premised upon a fundamental misunderstanding of the nature of the dispute and of the question Petitioner presents to this Court.

Rather than address each erroneous premise in Respondent's argument, Pentwater will demonstrate that the same dispositive issue and the same necessity for a federal common law rule to resolve it would exist even if the instant case had been brought by Ms. Guetzka herself rather than by her subrogee.

Let us assume that rather than paying Ms. Guetzka's claim, Petitioner denied it on the basis of the coordination of benefits (COB) clause in its policy (A-10 n 8). Ms. Guetzka's remedy against Respondent would be an action under § 502(a)(1)(B): no one questions her right under the ERISA to maintain such an action in state court. The dispute would be as follows:

(1) Ms. Guetzka would allege that Respondent Plan provides coverage for her medical expenses.

(2) Respondent Plan would answer that it owes no coverage because its COB clause (A-5 n 9) makes Petitioner's coverage primary.[1]

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[1] Respondent mischaracterizes its coverage by asserting that "there is no coverage for medical expenses arising out of an automobile accident [w]here there is also automobile insurance." (Brief in Response to Petition [hereinafter "Pentwater's Brief"], p. 7). Actually, the terms of Respondent Plan *do* provide coverage for such accidents, but only "excess insurance" over no-fault auto coverage. (A-5 n 9). Thus, if certain medical expenses were not covered at all by no-fault auto insurance (as is the case in some states), Respondent Plan *would* cover them.

Understanding the distinction between *no* coverage (which would be the case if a Plan excluded coverage for injuries sustained in an auto accident) and coverage whose level of priority depends upon

(*concluded on page 3*)

(3) Ms. Guetzka's reply would be that Petitioner would not pay because its COB clause makes Respondent primary.

Obviously, Ms. Guetzka's rights against Respondent could not be determined without a ruling on the effect of Respondent's COB provision in the face of Petitioner's COB provision. That determination could *not* be made under state law, because state law is preempted by the ERISA. Therefore, federal law would govern.

The only remaining question would be the rule of decision to be applied. The terms of the ERISA do not provide a rule of decision. Therefore, it would be *necessary* to resort to federal common law. And that takes us to the question presented in the instant case: What is the federal common law rule of decision for the effect to be given unambiguous and conflicting COB clauses?

In the instant case, the only difference from the hypothetical is that Petitioner did not deny Ms. Guetzka's claim, but instead paid all her medical expenses and then proceeded against Respondent as her subrogee. (A-5).[2] Petitioner's action against Respondent is to recover benefits under the Plan to the same extent that Ms. Guetzka would be entitled to recover. Petitioner's arguments are the same as those that Ms. Guetzka would have made. The dispositive question — the fed-

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(*continued from page 2*)

the existence of other applicable coverage (which is the case with COB clauses) is important in analyzing Respondent's argument that Petitioner is seeking a rule which would "mandate benefits" (Pentwater's Brief, p. 13) (discussed, pp. 4-5). The distinction is mentioned at this point only to confirm the accuracy of the text characterization of the dispute.

2 Respondent Pentwater does *not* claim that the ERISA precludes Petitioner from being subrogated to Ms. Guetzka's rights under the Plan. (Compare Brief in Opposition on Behalf of Frederick & Herrud, Inc., pp. 7-10).

eral common law rule of decision — is the same it would have been if Ms. Guetzka had litigated this action instead of her subrogee doing so.

Given the context provided by the foregoing, the legal and conceptual errors in Respondent's argument can be quickly and easily exposed.

First, Petitioner is not asserting greater rights against Respondent than Ms. Guetzka would have (Pentwater's Brief, pp. 9-10). Petitioner, as Ms. Guetzka's subrogee, is seeking no more than "to recover benefits due to" Ms. Guetzka.

Second, Petitioner is not seeking a "new remedy" (Pentwater's Brief, pp. 10-13). Petitioner, as Ms. Guetzka's subrogee, is seeking a dispositive federal rule of decision applicable to Ms. Guetzka's § 502(a)(1)(B) claim for benefits due under the Plan.

Accurately perceived in the conceptual context provided by the foregoing, Respondent's claim that the Michigan Supreme Court fully understood that a subrogee "was bound by the terms of the Respondent Plan" (Pentwater's Brief, p. 10) is nothing more than a conclusory statement of the federal common law rule that Respondent would like this Court to promulgate. It is not, as Respondent suggests, even relevant to the question whether Petitioner is seeking a "new remedy".

B. Promulgating A Federal Common Law Rule Applicable To Conflicting COB Clauses Would Not Mandate That Benefits Be Paid By An ERISA Plan That Does Not Provide Coverage For Injuries Sustained In Automobile Accidents.

Respondent seems to be making two arguments here.

The first is that Petitioner is seeking a rule that would mandate an ERISA Plan to pay automobile accident-

related medical expenses even though the plan "did not cover automobile accidents". (Pentwater's Brief, p. 13). In so arguing, Respondent confuses policies which *exclude* coverage for auto accidents with those which provide coverage which is qualified by the existence of other coverage. (See p. 2 n.1, *supra*).

If coverage is *excluded* by an ERISA plan, by hypothesis there can be no conflict with a COB clause in an applicable insurance policy, because COB clauses are only activated by the *existence* of other coverage. *E.g.*, *Liberty Mutual Ins. Group* v. *Iron Workers Health Fund*, 879 F.2d 1384 (6th Cir. 1989); *Allstate Ins. Co.* v. *Detroit Millmen's Health & Welfare Fund*, 729 F. Supp. 1142 (E.D. Mich. 1990); *Transamerica Ins. Co.* v. *Peerless Industries (Masco)*, 698 F. Supp. 1350 (W.D. Mich. 1988). However, Respondent's Plan does not exclude coverage, but merely makes its level of priority (primary or excess) contingent on the existence of other coverage. Therefore, the question presented to this Court does not even implicate Plans which, unlike Respondent, exclude coverage for auto related injuries.

The second argument seems to be an objection to courts (the only entities which apply federal common law) determining ("mandating") whether a Plan provides coverage. The short answer is that § 502(e)(1) of the ERISA plainly vests both state and federal courts with subject matter jurisdiction to resolve disputes as to the coverage afforded by the terms of an ERISA plan in actions which, like the instant one, are brought pursuant to § 502(a)(1)(B).

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C. The Validity Of The Seventh Circuit's Decision In *Winstead* Was Not Affected By This Court's Decisions In *FMC Corp.* Or *Mertens.*

Respondent asserts, without analysis or explanation, that the Michigan Supreme Court's decision in the instant case does not conflict with the Seventh Circuit's decision in *Winstead* v. *Indiana Ins. Co.*, 855 F.2d 430 (7th Cir. 1988), *cert. den.* 488 U.S. 1030 (1989), because *Winstead* is no longer viable. None of Respondent's conclusory averments advanced in support of that proposition are accurate.

First, contrary to Respondent's assertion, *Winstead* did *not* apply state law to resolve the issue before it. *Winstead* applied federal common law. 855 F.2d at 433-34 and n. 2. Therefore, as the Sixth Circuit noted in *ACIA* v. *Health & Welfare Plans, Inc.*, 961 F.2d 588, 595 n. 14 (6th Cir. 1992), *Winstead* is not inconsistent with this Court's decision in *FMC Corp.* v. *Holliday*, 498 U.S. 52 (1990).

Second, *Winstead* is not inconsistent with this Court's decision in *Mertens* v. *Hewitt Associates, Inc.*, 508 U.S. ___; 113 S. Ct. 2063 (1993), which held that money damages are not available as "appropriate equitable relief" under § 502(a)(3) of the ERISA. As already noted, the question before this Court is not the existence of a remedy, but rather the federal common law rule of decision applicable in an action seeking to enforce an already extant remedy under § 502(a)(1)(B).

Finally, Respondent argues that *Winstead* is irrelevant because Petitioner's status as Ms. Guetzka's subrogee eliminates the conflict between the COB clauses, because (?) the rights of a subrogee must be determined solely by reference to the terms of the ERISA Plan. The erroneous premise for this argument has already been exposed *supra* at pp. 2-4.

D. State Courts Have Subject Matter Jurisdiction To Decide Actions To Recover Benefits Due A Beneficiary Under The Terms Of An ERISA Plan.

Here, again, Respondent premises an argument on the rule of decision it wants this Court to promulgate, i.e., that the terms of an ERISA plan are to be given full effect even where a COB clause in that Plan conflicts with a COB clause in another applicable insurance policy. However, whether that rule of decision is correct is precisely the question presented to this Court in the instant case. There are other conceptual flaws in Respondent's argument, but assuming as a premise the answer to the question presented is in itself fatal.

Respectfully submitted,

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